On the Separation of Powers and the Judicial Self – Defence at times of unconstitutional capture

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"It is the institutions that help us preserve decency. They need our help as well. Do not speak of “our institutions” unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So choose an institution you care about – a court, a newspaper, a law, a labor union – and take its side."[1)](Snyder, On Tyranny. Twenty lessons from the twentieth century, The Bodley Head London, 2017, p. 22

While the rigidity of the separation of powers among different branches of government varies, this does not call into question its more general function – to limit and constrain power. With the Polish constitutional debacle (we are now well past the “crisis” phase) in full swing (the last proof of ill will was furnished this week when three judgments at the heart of the European Commission’s rule of law recommendations, were miraculously removed from the website of the Constitutional Court), the challenge is on the legal circles to stop playing lame duck, but rather mobilise themselves, come together and, within the confines of the constitutional system, strike back and stand up for the battered Constitution. The Congress of Polish Lawyers held in Katowice on 20th of May 2017 might indeed be the first symptom of such mobilisation and “legal complex” in the making.

I have already argued in favour of the emergency judicial review review exercised by the ordinary judges in order to defend constitutional essentials and recapture the Constitution (see here and here) . whereby ordinary judges take on the role of checking constitutionally suspect statutes and thus enforcing the constitutional document in their daily adjudication. As much as this perspective of “here and now” is important and tempting, let us look beyond the Polish case and think in more general terms and concepts. Such systemic approach is badly needed in constitutional times when, more often than not, things do not go as planned and institutions face challenges of survival and self – defence.

Unconstitutional capture is a generic term and stands for systemic disablement of the checks and balances and extinguishing any possible pockets of independence. It makes a sham of a constitutional document as it strips it of its limiting and constraining function. The separation of powers becomes illusory and gates to unchecked arbitrariness are opened. Yet the capture is not a one-off aberration. It is a novel threat to the rule of law as it is not limited to one moment in time. It is a process of incrementally taking over the independent institutions and the liberal state. The question is how best to respond to such creeping capture in the name of majoritarian democracy? We have already seen a spectacular abdication by the European Commission, faced with such creeping capture, of its duty of the guardian of the Treaties.

Should we then throw up our hands in despair and simply accept the relentless march of capture? Judicial resistance from within might provide a ray of hope.

Judicial self – defence and constitutional essentials

Law has two faces: textual and contextual. The former is built and developed through various mechanisms at the level of the regulation (“law in the books”), while the former is more flimsy and difficult to pinpoint. It is about culture and fidelity to the values that underpin law in books. The former might be changed over night, while the latter is based on long-term vision predicated not only on building state governed the laws, but also on sustaining it long – term. Importantly, both faces are part of the same narrative: rule of law and our trust in the transformative power of

the law. For our faith to be firmly rooted and reach beyond “here and now”, though, law must never stray too far away from culture and fidelity that make a constitutional document resistant to changing fortunes of “law in the books”.

Fears of conflicts between the ordinary judges and constitutional courts are premised on the well functioning system of judicial review in which the constitutional court is, as mandated by the cConstitution, effectively wielding its power of judicial review. This changes when the review is debilitated and the court emasculated. This is an important caveat in my analysis, as judicial review by ordinary judges is always a second – best scenario and responds to the disablement of the judicial review and the marginalization of the Constitution. It is here that the question of judicial self – defence looms large. As N. Barber argues, institutional self – defence obtains when “the institution is given a shield to protect against the attentions of another body, or is given a sword it can use to repel or deter an attack[2)]N. W. Barber, Self – defence for the institutions, (2013) 72 The Cambridge Law Journal 558..

However, and this is important, self – defence mechanisms are created not only to protect the institution. While being used against another body, they might contribute to the betterment of the constitutional system. Emergency judicial review by ordinary judges faced with the disablement of the constitutional court is indeed a self – defence mechanism against the concerted attack by the government on the integrity of the legal system and existing checks and balances. Some argue that ordinary courts must not have the competence to wield constitutional review as such competence had not been conferred on them by the drafters. This argument would be relevant when things go as planned and the system operates in accordance with the ground rules. The perspective changes in extraordinary times of unconstitutional capture where beggars can’t be choosers and should take advantage of what is available to stave off the gradual capture of the checks and balances. Importantly, Barber goes on (at p. 559) “if the capacity it confers is attractive, the mechanism may be said to have this (protective – T. T. K.) function, even if it may not have been created for this purpose”. He says this (at p. 560): “[…] whilst the conferral of the capacity was not a psychological reason for the mechanism’s creation – it was not a reason in the mind of the creators – it remains a justificatory reason that supports the existence of the mechanism – a reason for us to want the mechanism to remain part of the constitutional order”.

This is exactly the case of judicial review , whereby ordinary judges take on the role of checking constitutionally suspect statutes and thus enforcing the constitutional document in their daily adjudication. Such review would be channeled towards defending the separation of powers, and more broadly, the integrity of the constitutional system. It is attractive because it might be effective when all other mechanisms have failed or/and have been disabled by the majority as part of the unconstitutional capture. With the emergency review the courts do not use the capacities that run contrary to the constitution. Rather, they take advantage of the implicit empowerments contained in the constitutional text that never fully close the door on the ordinary courts exercising such review powers. Exceptional powers based on the reading of implicit empowerments in the constitutional document are informed by the self – defence rationale. The latter provides justificatory reason for such reading of the constitution. Self – defence becomes part of the judicial mandate.

The resort to the self – defence is not predicated on the self – aggrandizement of courts (even though, it might lead incidentally to growth of judicial power across the board) but first and foremost aims at preventing the constitutional system from being disintegrated. Barber mentions (at p. 563 – 564) that there is always a cost for the body against which the powers of self defence are exercised, but also a cost for the body that wields powers of self – defence mechanism and the end result is that “where one institution acts against another, the whole constitution works less smoothly”. Yet, the situation is different with the “emergency judicial review” as an instance of self – defence mechanism. The Constitution and its ordinary mechanisms has already stopped working under the pressure of incessant unconstitutional capture. The self – defence by courts aims now at restoring some equilibrium. Importantly, as we move forward and enter the uncharted territory of separation of powers and rule of law in distress, most important issue should indeed be, as powerfully espoused by M. Shapiro many years ago, not how institutions shape politics, but how politics shape institutions[3)]See his classic treatise Courts. A Comparative and Political Analysis, (University of Chicago Press, 1981).. When rule of law and separation of powers are systematically

undermined by the majoritarian politics disguised as democracy, courts must not pretend that this is of no concern to them and to continue “business as usual”. Politics shape courts' responses and emergency judicial review is one of these.

The Constitution read as a whole produces a self – defence mechanism in the form of emergency judicial review to save those constitutional essentials that are still to be saved from being captured. Emergency judicial review as a self – defence mechanism is instrumental in that it is reconstructed with one aim and one aim only: to protect separation of powers from falling into oblivion and to maintain the minimum effectiveness of the constitution. Emergency review as a self – defence mechanism is not to inhibit the functioning of the Constitution, quite the contrary. Emergency judicial review is employed at the service of separation of powers, and more broadly constitution survival as the supreme law of the land. One branch of the government (courts) not only protects itself against the executive and legislative, but doing so it restores the constitutional integrity. It is true that there is a price that comes with resorting to the self – defence. The endangerment of the judicial branch as a whole. The parliamentary majority behind the unconstitutional capture might feel threatened and will decide to strike back and intensify its attempts at total capture. With the emergency judicial review in operation, the constitutional landscape and the separation of powers itself are reshuffled and will never be the same. The courts will either survive, strengthened by newly – claimed judicial review (“new” separation of powers will emerge), or fall in the process together with the separation of powers and the Constitution they set out to defend. In either case the contours of the separation of powers will shift considerably as one branch (courts) might be vindicated or marginalised and swept aside by the capture completed by two remaining branches (executive and legislative) behind the capture.

Applying all this to the exemplary Polish case, I am not sure whether the drafters of the Polish Constitution have designed the system with the emergency review in mind. Certainly, unconstitutional capture of a kind that has been engulfing the Polish constitutional system was not their main concern. They might even not anticipated that things might get out of hand so badly and so quickly. Yet their state of mind at the time of drafting must not be conclusive in our present attempt to build a case for judicial review by ordinary courts. What matters is, first, whether the constitutional text contains enough arguments to make a plausible case for such review to be defended the function (it does), and second, whether the judges would be willing (temperamentally and intellectually) to resort to self – defence mechanisms (which we don’t know).

Separation of powers and the rule of law. When things go really wrong

“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of the government. But what is government itself, but the greatest of all reflections on human nature […]. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed ; and in the next place to oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions”[4)]The Federalist Papers (No. 51), selected and edited by R. P. Fairfield, (The Johns Hopkins University, 1961), p. 160.. The separation of powers offer us the best example of such an auxiliary precautions referred to by J. Madison. Separation of powers and judicial review are instrumental institutions necessary to implement the rule of law and enforce the constitutional text against the governors. As J. Raz puts it “the courts should have review powers over the implementation of other principles”[5)]J. Raz, The Authority of Law, (Oxford, Clarendon Press, 1979), at p. 217.. Judicial review helps keep the governors in check and ensures the supremacy of the constitution against the strategies of short-circuiting it for the benefit of ever – changing politics of the day.

My own understanding “Marbury moment” stands for more than a seminal case decided by any particular jurisdiction, although such a decision might act (and often does) as a catalyst. “Marbury moment” signifies as well a strategic process of planning and executing whereby courts fully realize their mandate and judicial function to defend the constitution and its values[6)]This last element is taken from S. A. Koch, Marbury Moments, (2005) 54

Columbia Journal of Transnational Law 116, p. 120 with further references.. To this might be added a moment at which courts claim powers to control elected officials. In the context of my emergency judicial review „Marbury moment" would transcend one particular decision and involve sustained practice of ordinary courts upholding, in the absence of effective Constitutional Court, the Constitution by reviewing constitutionally suspect regulation(s) adopted by the majority. As we move forward and enter the uncharted territory of separation of powers and rule of law in distress, most important issue should indeed be, as powerfully espoused by M. Shapiro many years ago, not how institutions shape politics, but how politics shape institutions[7)]See his classic treatise Courts. A Comparative and Political Analysis, (University of Chicago Press, 1981).. When rule of law and separation of powers are systematically undermined by the majoritarian politics disguised as democracy, courts must not pretend that this is of no concern to them and to continue "business as usual". Politics shape court's responses and emergency judicial review is one of these. With this separation of powers will never be the same and this in itself is a huge challenge for constitutionalists: to move away from cosy world of sacrosanct and time – honoured concepts that always work to fuzzy and unpredictable world of "new authoritarians" who only rarely appear as wolves, rather are clad in sheep's clothing[8)]This apt metaphor comes from O. Varol, Stealth authoritarianism, (2015) 100 Iowa Law Review 1673, at p. 1677.. These "authoritarian sheep" reshuffle our safe world and test constitutional concepts to their limits.

Epilogue or a new prologue? Judicial Resistance and the New Separation of Powers

The fascinating problem of judicial resistance has been en vogue recently [9)]See D. E. Edlin, Judges and unjust laws. Common Law Constitutionalism and the Foundations of Judicial Review, (University Michigan Press, 2010); H. P. Graver, Judges Against Justice: On Judges When the Rule of Law is under Attack, (Springer, 2015).. Yet the resistance by the judges as understood here takes on a special meaning when the discussion turns not simply on laws that are unjust, but rather on laws that strike at the very core of the democratic state governed by the rule of law. These are the laws whose very democratic pedigree could be questioned. Such laws are "wicked"[10)]T.R.S. Allan, Justice and Integrity: The Paradox of Wicked Laws, (2009) 29 Oxford Journal of Legal Studies 705. in a systemic sense.

However,The disagreement between the branches of the government is nothing extraordinary. Quite the contrary. They make the system move forward. As argued by A. Barak "Tension between the courts and the other branches is natural and […] also desirable […]. The legislative viewpoint is political; the judicial viewpoint is a legal one. Other branches seek to attain efficiency; the courts seek to attain legality. The different viewpoints, the need to give explanations to the court and the existing danger – which at times is realized – that an executive action is not proper, and the courts will determine is as such, create a constant tension between the courts and the other branches". He continues, on a more somber note: "Matters begin to deteriorate, however, when the criticism is transformed into an unbridled attack. Public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When such attacks affect the composition or jurisdiction of the court, the crisis point is reached […] What should judges do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it"[11)]A. Barak, The Judge in a Democracy, (Princeton University Press, 2006), p. 216 – 217..

The emergency constitutional review as an example of self – defence does not simply respond to legal change or a tension between the branches. It staves off systemic revolution brought about by unconstitutional capture of independent institutions. As such it is an instance of judicial meta-resistance. Defending constitutional integrity and values is more important than hair – splitting over the separation of powers. The latter should be understood as an instrumental for the realization of the former, and when necessary, adapted to the exigencies of the times. Otherwise, separation of powers would be flouted at will by the majority with the argument that such actions are justified within the classical separation of powers (parliament legislates, executive implements, judges apply laws). Should we agree with such narrative, we would in fact be allowing the enemies of democracy dictate their skewed

understanding of the separation of powers. We must never forget that this doctrine has always had at its core the prevention of unfettered discretion, and to this end it must be as much about separation, as it is about checks and balances.

Today, as we witness growing anti-judicial sentiment, “judicial review” by ordinary judges and the constitutional recapture are but expressions of judicial faithfulness to the constitutional document. Through emergency judicial review the constitutional legal system is protected against disintegration and judges express their loyalty to the values and principles underlying constitutional document. As such, emergency judicial review is not contrary to the separation of powers or lying outside it. Rather, it must be seen as forming part and parcel of the separation of powers and should inform judges’ actions in times when not everything goes according to the script and red lines are crossed as a matter of routine.

Again, as we try to move on in Poland and elsewhere where capture looms, fundamental question keeps coming back to the fore: what about the judges faced with such systematically flawed laws? Two options are possible here. On the one hand, a judge may always continue business as usual and keep to his traditional role of “an operator of a machine designed and built by legislators. His function [would be] a mechanical one […] the civil law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs important but essentially uncreative functions”[12)]J. H. Merryman, The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America, (Stanford University Press, 1969), p. 38.. However, when our constitutional world comes crashing down, this comfortable non – possumus must be rejected out of hand.

Instead, the argument espoused here aimed at building a case for more engaged judiciary, one that is ready to leave the comfort zone of rule – book conception of the rule of law, respond to the constitutional exigency and fight back in the name of the constitutional document. When the constitution is disregarded and the court responsible for overseeing the separation of powers ridiculed and destroyed, judges face their ultimate test of belonging and fidelity, or, as A. Barak points out (at p. 240): “he (the judge) should remain loyal to the democratic system and to society, continue to honour the legislative branch, and work toward the realization of the judicial role. The judge must guard the part of the relationship that remains. The judge must be aware of what is going on around him. The judge must not surrender to the ill winds. […] At the foundation of this approach is the basic view that the court does not fight for its own power. The efforts of the court should be directed toward protecting the constitution and its values”. All this while always staying within the four corners of the separation of powers and democracy and … in defence of it. The elegant and lofty “Protecting the constitution and its values” is the key word here. It provides the ultimate logic behind the judicial resistance and constitutional recapture, logic that fundamentally transforms the separation of powers and its contours, in times when new authoritarians would love to see separation of powers disappear altogether.

For the doctrine itself and its survival, the stakes could not be higher: either rely on the self – defence mechanisms of the legal system and hope for its capacity to persevere, evolve and strike back or give in and risk total constitutional oblivion. When the constitutional essentials are on the line “the defence must be commensurate to the danger of attack” (The Federalist no 51). We, lLawyers, (not only constitutionalists), must change and adapt our vocabulary and conceptual arsenal as well, so as to better prepare for constitutional times when, more often than not, things do not go as planned. Tall order indeed. This analysis was started with reference to Poland and I want to finish with a Polish accent. It seems that, at least lawyers in Poland are finally waking up to difficult challenge of soul-searching and starting to learning how to stand up against no holds barred politics. A wWord of caution, though, is in order. There is no time for chest – thumping yet. A long process to regain the hijacked rule of law and public confidence in the law has only started and long road still lies ahead. As we try to adapt our constitutional vocabulary and arsenal, institutional self – defence and civic fidelity to institutions are solid foundations to build on.

PS. On May 31, Polish Supreme Court, sitting in the chamber of 7, has ruled that the President of the Republic of Poland has no competence to pardon a person who has not been sentenced in a final judgment. Presidential pardon must encroach on the competence of independent courts to decide individual cases in accordance with the law. This

case stirred up huge controversy in 2015 when the President pardoned former head of the anti-corruption agency. (on the case see here)

The ruling by the Supreme Court is an unprecedented instance of Polish judges standing up in the name of the separation of powers and constitutional essentials. Ground-breaking message is this and must not be lost on the world: there are limits after all to what majoritarian democracies can do and, crucially, there are judges willing to enforce these limits against both the majority of the day and the President. Constitution remains the supreme law of the land and this applies to the President as well, message worth bearing in mind given how blatantly the President has violated the Constitution by refusing to swear in new judges of the Constitutional Court, and instead swearing in PIS – backed fake judges.

Indeed, constitutional fidelity and judicial resistance at their best. After one year and a half of watching and standing by, judges make their voice heard. something is finally happening. No doubt, This is one of these cases that builds the legitimacy of courts and will stand out in the institutional history of Polish Supreme Court. It shows that "In the institutions We Trust" does not have to be an elegant rhetoric figure.

This analysis draws on my paper Unconstitutional capture and constitutional recapture. Rule of law and the separation of powers in flux? presented at the symposium Separation of powers and the constitutional dialogues, (Milan, 22 May 2017).

References [+]

1. ↑ (Snyder, On Tyranny. Twenty lessons from the twentieth century, The Bodley Head London, 2017, p. 22
2. ↑ N. W. Barber, Self – defence for the institutions, (2013) 72 The Cambridge Law Journal 558.
3, 7. ↑ See his classic treatise Courts. A Comparative and Political Analysis, (University of Chicago Press, 1981).
4. ↑ The Federalist Papers (No. 51), selected and edited by R. P. Fairfield, (The Johns Hopkins University, 1961), p. 160.
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6. ↑ This last element is taken from S. A. Koch, Marbury Moments, (2005) 54 Columbia Journal of Transnational Law 116, p. 120 with further references.
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SUGGESTED CITATION Koncewicz, Tomasz Tadeusz: *On the Separation of Powers and the Judicial Self – Defence at times of unconstitutional capture, VerfBlog,* 2017/6/04, http://verfassungsblog.de/on-the-separation-of-powers-and-the-judicial-self-defence-at-times-of-unconstitutional-capture/, DOI: https://dx.doi.org/10.17176/20170604-130942.